IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 6125

GUS POLITES,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GOODMAN, CROCKETT, EDEN & ROBB,
Attorneys for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

Interstate Brief & Record Co. 642 Beaubien St., Detroit 26, Michigan

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Petitioner prays for a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Sixth Circuit which affirmed a judgment of the United States District Court for the Eastern District of Michigan, Southern Division. The District Court denied a Motion, filed by Petitioner pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, asking that the judgment of denaturalization against Petitioner be vacated and the judgment of naturalization reinstated.

OPINIONS BELOW

No printed opinion was filed by the Court of Appeals Copy of the Court's order of affirmance appears in the Appendix to this Petition. The opinion of the District Court appears to be unreported. It is reproduced in the Appendix to this Petition.

JURISDICTION

The order of affirmance by the Court of Appeals was entered on October 16, 1959. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U.S.C.A. Sec. 1254.

QUESTIONS PRESENTED

I.

Has Petitioner been deprived of his citizenship without due process of law by reason of the District Court's erroneous interpretation and application of the denaturalization law (8 USC. Sec. 738(a)), where, as here the proofs adduced by the Government and the findings made by the Trial Court, failed to meet the standards for denaturalization as subsequently clarified in this Court's decisions in *Nowak v. United States* and *Maisenberg v. United States*, 356 U.S. 660 and 670, 78 S. Ct. 955 and 960?

II.

Is the remedy provided in Rule 60(b) of the Federal Rules of Civil Procedure available to set aside a judgment of denaturalization and restore citizenship to one whose citizenship has been cancelled erroneously and without due

process of law; and notwithstanding an appeal from such cancellation was perfected and subsequently was dismissed by stipulation following this Court's denial of certiorari in three (3) similar cases from the same Court of Appeals raising identical legal and factual issues?

STATUTES INVOLVED

The Act of June 29, 1906 (34 Stat. L. Part 1, p. 596) as amended, provided in Section 7 thereof:

> "That no person who disbelieves in or is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government * * * shall be naturalized or be made a citizen of the United States."

The above Act of June 29, 1906 was superseded by the Nationality Act of 1940 (Title 8, U.S.C., Sec. 700 et seq.). The pertinent portions of the 1940 Act are the following:

> "Section 705. No person shall hereafter be naturalized as a citizen of the United States—
>
> (a) Who advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that advises, advocates, or teaches opposition to all organized government; or
>
> (b) Who believes in, advises, advocates or teaches, or who is a member of or affiliated with any organization, association, society or group that believes in, advises, advocates, or teaches—the overthrow by force or violence of the Government of the United States or of all forms of law;
>
> * * * * *

"The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization is, or has been, found to be within any of the clauses enumerated in this section, notwithstanding that at the time petition is filed he may not be included in such classes."

• • • • •

"Section 707(a). No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner,

(1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the Petitioner resided at the time of filing the petition for at least six months,

(2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and

(3) during all the periods [five (5) years] referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed ot the good order and happiness of the United States."

• • • • •

"Section 738(a). It shall be the duty of the United States District Attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of Section 301 (Title 8 U. S. C. Sec. 701), in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling

> the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure provides:

> "(b) * * * on motion and upon such terms as are just, the Court may relieve a party * * * from a final judgment * * * for the following reasons: * * * (5) * * * it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment * * *"

STATEMENT OF THE CASE

Petitioner, 59 years of age, is a native of Greece who has lived in this country continuously since he was sixteen (16) years old. He is married to a native born American citizen and they have two children and two grandchildren. He has no criminal record. Until approximately a year ago, he was employed as a truck salesman of food products. Failing health now prevents his employment. He has been ordered deported to his native Greece and his application for a suspension of deportation has been denied.

Petitioner's Naturalization

On April 6, 1942, Petitioner was naturalized by the Federal District Court at Detroit (App. 3a)[1] At the time of his naturalization the Nationality Act of 1940 (54 Stat. 1137, 1141, 8 U.S.C. 738(a) was in effect. Section 705 of that Act made an alien ineligible for naturalization if he

[1] ("App. —" refers to the Appellant's appendix in the Court of Appeals.)

had been a member of an organization advocating violent overthrow of the Government at any time during a period of ten (10) years preceding the filing of his petition for naturalization. A petitioner for naturalization also was required to affirm his "attachment to the principles of the Constitution of the United States."

The form of Preliminary Petition for Naturalization (Govt. Exh. 2, App. 18a) executed by Petitioner in 1940 contained the following as Question No. 28:

> "Are you a believer in anarchy? * * * Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? (Govt. Exh. 2.)"

Petitioner answered "No."

The form of Petition for Naturalization (Govt. Exh. 1, App. p. 16a), executed by Petitioner stated:

> "(15) I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition, an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; *nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government.*" (Emphasis supplied.)

Petitioner's Denaturalization Proceedings

Ten years after Petitioner's naturalization and on June 16, 1952 the Government filed its Complaint (App. 2a) in the Court below seeking revocation of Petitioner's naturalization upon the grounds of fraud and illegal procurement. (Section 338(a) of the Nationality Act of 1940 (8 U.S.C. Sec. 738(a).)). It charged that Petitioner had been a member of the Communist Party from 1933 to 1941 and had concealed such membership at the time of his naturalization. It further charged that naturalization was illegally procured because Petitioner had been a member of the Communist Party within the ten (10) years preceding the filing of his petition for naturalization; that the Communist Party, during the period of his membership, taught and advocated the violent overthrow of the Government of the United States; that he "was familiar with and approved of the activities, aims, and teachings of the Communist Party"; and that he was, therefore, ineligible for citizenship and lacking in attachment to the Constitution.

Additionally, the Complaint alleged that in 1940, and prior to the filing of his petition for naturalization, Petitioner executed and filed an Alien Registration Form in which he falsely denied membership or activity in any "clubs, organizations or societies" and falsely stated that "within the past five (5) years he had not been affiliated with or active in any organizations devoted to furthering the political activities or public policy of any foreign government."

Petitioner's summary of the entire testimony at the trial (App. 43a-47a) was filed with his Rule 60(b) motion. The Government's summary of the proofs upon which it relied to establish these charges, was filed at the request of the Trial Court (App. 50a-54a).

Petitioner, called by the Government as a witness, testified that he was a member of the Communist Party from 1931 to 1938 but held no Party office (App. 44a). Relying upon his Fifth Amendment privilege, he declined to state whether or not he was a member of the Communist Party at any time subsequent to his 1942 naturalization (App. 44a).

The Naturalization Examiner, called as a witness, testified that at the time he interviewed Petitioner he did not ask Petitioner if he was or had been a member of the Communist Party (App. 45a).

Other witnesses, former members of the Party, were called to identify Party publications and to testify concerning Petitioner's activities in the Party and related organizations. Their testimony is sufficiently set forth in the above summaries.

The opinion of the District Court cancelling Petitioner's citizenship held that Petitioner had obtained citizenship fraudulently and illegally (App. 22a).

Judgment of denaturalization was entered on August 20, 1953. Notice of Appeal was filed and the appeal was docketed in the Court of Appeals.

Meanwhile, the Court of Appeals had under consideration three (3) denaturalization appeals from the Eastern District of Michigan. (*Sweet, Chomiak* and *Charnowola*, 211 F. 2d 118.) Each of these three (3) appeals involved denaturalization judgments, entered under the Nationality Act of 1940, because of (a) failure to disclose prior Communist Party membership, and/or (b) membership in that organization within the statutory ten (10) year period. The proofs as to the Party's advocacy in each case were the same as here and were based upon the same Marxist

Leninist writings. In each of these three (3) appeals the appellant was represented by the same counsel as this Petitioner.

After Petitioner's appeal had been filed but before briefs were due, the Court of Appeals entered judgments of affirmance in each of the above three (3) cases. Petitions for Certiorari were filed in each case in this Court. (October Term, 1954, Nos. 73, 74 and 75) and counsel for Polites thereupon obtained from the Court of Appeals the following order extending the time for filing briefs in his appeal:

> "extended to 30 days from the date of final disposition by the Supreme Court of the United States of the Petitions for Certiorari in the cases of *Sam Sweet v. United States, Charnovola v. United States*, and *Chomiak v. United States*, * * *."

Following the denial of certiorari in the last mentioned three (3) cases (348 U. S. 817), the parties stipulated for dismissal of Petitioner's appeal with prejudice.

Thereafter, and on January 31, 1955, deportation proceedings were instituted against Petitioner culminating in a final order of the Board of Immigration Appeals, entered on January 6, 1956, directing Petitioner's deportation to his native Greece because of his admitted prior membership in the Communist Party subsequent to his entry into this country. (See Sec. 241 (a)(6)(C) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1251 (a)(6)(C).

The Present Proceeding

On May 6, 1958, this Court decided *Nowak v. United States* and *Maisenberg v. United States*, 356 U.S. 660 and 670, 78 S. Ct. 955 and 960, reversing judgments of denaturalization theretofore rendered in each of these cases by the same District Judge who had heard Petitioner's denaturalization.

Relying upon *Nowak* and *Maisenberg*, Petitioner, on August 6, 1958, filed Motion under Rule 60(b) of the Federal Rules of Civil Procedure (App. 37a) to vacate the denaturalization judgment in his case.

The District Court denied the motion for two reasons. The Court apparently believed that the 1940 nautralization statute under which Petitioner was naturalized was distinguishable from the 1906 Act, as amended, which was before this Court, in *Nowak* and *Maisenberg*. And second, the District Court believed that it was precluded by this Court's decision in *Ackermann v. United States*, 340 U.S. 193 and the decision of the Sixth Circuit in *Berryhill v. United States*, 199 F. 2d 217, from granting relief under Rule 60(b) based upon "a change in the judicial view of the applicable law." The reluctance of the District Court in reaching this decision is apparent from the following concluding portion of its opinion (App. 58a):

> "Ordinarily we would have granted petitioner's prayer, particularly under subsections (b)(5) of Rule 60, authorizing us to do so, if it is no longer equitable that the judgment should have prospective application. But in our opinion, our Court of Appeals specifically eliminates such holding * * *."

REASONS FOR GRANTING THE WRIT

I.

1. In *Nowak* and *Maisenberg*, this Court reiterated and applied legal principles which it had enunciated in *Schneiderman*, 320 U.S. 118. During the "Cold War" years and particularly in the period following *Dennis v. United States*, 341 U.S. 494, the Government—and in large measure the District Courts—regarded *Schneiderman* as setting forth merely a rule of evidence in denaturalization cases; unmindful of the Constitutional safeguards that rule was intended to preserve for all naturalized citizens.

If, as we contend, Petitioner's denaturalization proceeding is indistinguishable on any material issue from *Nowak*, then clearly he has been erroneously deprived of his citizenship. This loss and the obvious consequences it entails under the circumstances here presented is so unfair that the order of cancellation and its continued operation amounts to a denial of substantive due process to this Petitioner. Certainly the consequences are such as to warrant an exercise by this Court of its supervisory power over the lower Federal Courts to insure that a federal question entailing such grave consequences not be decided—or allowed to stand—in a way that conflicts with applicable decisions of this Court.

2. On its material facts Petitioner's denaturalization proceeding was practically identical with *Nowak*. If any factual difference is to be noted, then *Nowak* was a stronger case for the Government by reason of the testimony of Nowak's personal advocacy and his allegedly active participation in the higher echelon of the Communist Party.

The complaint in Petitioner's case (App. 2a) is almost identical with the complaints in *Nowak* and *Maisenberg* in setting forth the allegations of fraud and illegality. Thus illegality in both is predicated upon a claimed proscription of Communist Party membership under both the 1906 and 1940 Acts and a claimed lack of attachment because of prior Communist Party membership; and fraud is predicated upon alleged falsity in answering the identical Question No. 28, in the identical Preliminary Petitions for Naturalization forms in each case.

The only difference which need be noted in the factual allegations of the Complaints is that in Petitioner's case fraud also was sought to be predicated upon allegedly false answers in his Alien Registration form. We discuss this later at pp. 16-17.

In both Petitioners' case and in *Nowak* the evidence indicated and the Trial Court found that neither was asked during the naturalization process concerning Communist Party membership. But, unlike Nowak, Petitioner testified as to his prior membership and his activities in that organization. And his evidence coupled with that of the Government's witnesses, confirms the extremely minor role he had among the dozen or more Greek members of the Party in Detroit (App. 43a and 52a).

The Government's so-called expert witness—Nowell—was the same in both cases; and his testimony concerning the Party's alleged advocacy is the same. Likewise, the books and pamphlets relied on by the Government to show the Party's advocacy were the same in each case.

On the specific question of Petitioner's personal advocacy or his knowledge of alleged illegal advocacy by the Party, a comparison should be made between this Court's summary of the alleged advocacy in *Nowak* (356 U. S. at p. 666) and

the Government's own summary of Petitioner's alleged advocacy and knowledge. Such a comparison indicates that, on the facts, Petitioner's case is well within the holding of this Court in *Nowak*.

3. In its legal theory the Government's case for Petitioner's denaturalization is likewise indistinguishable from *Nowak*. The denaturalization proceedings in both cases were grounded upon Sec. 338(a) of the Nationality Act of 1940 (54 Stat. 1137, 1158), notwithstanding Nowak was naturalized under the 1906 Naturalization Act. Unquestionably, the language of the two acts (*supra*, p. 2), is not the same on the question of political beliefs. The 1906 Act barred disbelievers in organized government, whereas the 1940 Act added an expressed reference to persons and organizations teaching and advocating violent overthrow of the Government of the United States.

What is important, however, is not the difference in language, nor the difference in the actual reach of the two statutes; but rather, the Government's interpretation of that difference and this Court's ruling on that interpretation in *Nowak* and *Maisenberg*.

The interpretation of the 1906 Act, contended for by the Government and accepted and relied on by the Trial Court in its decision in *Nowak* (133 F. Supp. 191) was that the 1940 statute, in expressly referring to advocacy of violent overthrow, merely made explicit what was already implicit in the previous law, i.e., that the 1906 Act, as amended, necessarily barred Communists from citizenship because membership in that Party was incompatible with attachment to the Constitution. (See the District Court's "Conclusions of Law" in *Nowak*, 133 F. Supp. 192.) In short, both the Government and the Trial Court tried the *Nowak* case as though the political proscriptions in the 1906 Act and the 1940 Act were the same.

This, also was the rationale of the affirmance by the Court of Appeals in *Nowak* (238 F. 2d 282), as evidenced by that Court's reliance in those cases upon its prior holdings in the *Sweet*, *Chomiak* and *Charnowcla* cases, 211 F. 2d 118, each of which involved naturalization under the 1940 and not the 1906 Act. Thus the Court of Appeals in *Nowak* said:

> "Upon consideration of the briefs, the oral arguments and the records in these two cases, [Nowak and Meisenberg], we find that all points of law made and argued by appellants * * * have been adjudicated adversely to the contention of appellants in the opinion of this Court * * * in [*Sweet*, *Chomiak* and *Charnowcla*]."

Of these three cases—*Sweet*, *Charnowcla* and *Chomiak* the last bears the closest resemblance on its facts to Petitioner's case. *Chomiak* was the only one of the three where the proofs failed to show and the Trial Court did not find that the alien was asked and answered falsely questions concerning membership in the Communist Party. Such membership was admitted at the trial and denaturalization was based entirely upon membership in a proscribed organization. (See the Government's joint brief in this Court in opposition to Certiorari in each of these three (3) cases, Nos. 73, 74 and 75, October Term, 1954, at pps. 4-12 and 15-18).

In *Chomiak* (as in *Nowak*; *Meisenberg*) the Government contended that ~~proof~~ of knowledge by the alien of the organizations alleged illegal advocacy was not necessary under either the 1906 or the 1940 Act to sustain denaturalization based upon illegal procurement. And both the Trial Court and the Court of Appeals accepted this interpretation of the 1940 Act; and this Court denied certiorari (348 U.S. 817). In the course of the subsequent Trial of Petitioner's denaturalization case in the same District Court, both the Government and the Trial Judge made repeated

references to *Chomiak*, *Sweet* and *Charnowola*, as having settled the law of the case. See Trial Transcript at pps. 6-9, 348-353, 380-388, 425-428 and 484-498.

The Government's theory of the sameness of the political proscriptions of the two Acts and the sameness in the nature and extent of the showing required to sustain denaturalization under either act, also was urged upon this Court in *Nowak*. And, the correctness of this theory appears to have been assumed by this Court, for purposes of its decision, when it said:

> "* * * But this proof [of membership without a showing of awareness of the illegal aspects of the Party's program (*Nowak, supra*, at p. 666)] does not suffice to make out the Government's case, for Congress *in the Nationality Act of 1940* did not make membership or holding office in the Communist Party a ground for loss of citizenship. (*Nowak, supra*, at p. 668). (Emphasis supplied.)"

Making this assumption, namely, that illegal procurement can be shown with respect to naturalization under either Act, by proof that the alien was a member of the Communist Party with knowledge that the Party advocated violent overthrow in terms of incitment to action (*Maisenberg, supra* at p. 672), this Court, nevertheless, concluded in *Nowak* and *Maisenberg*, that the proofs were insufficient to make such a showing under either the 1906 or the 1940 Act.

Nowak, then, represents not only this Court's view concerning the proper interpretation to be placed upon the political proscription and the character of the proofs needed to cancel citizenship obtained under the 1906 Act, but it likewise represents this Court's views concerning the requirements for cancellation, on the ground of illegality of citizenship obtained under the 1940 Act as well.

In other words, Nowak stands for the two basic propo sitions that denaturalization may not be decreed under Sec 338a of the Nationality Act of 1940, because of fraud i any case where the claim of fraud is predicated upon failure by an applicant for citizenship to disclose his pas Communist Party membership in answer to Question 2 on the preliminary naturalization form used in Nowak cas and in Petitioner's case; nor may such denaturalizatio be decreed because of illegal procurement in any case wher the claimed lack of attachment or membership in a pro scribed organization is based solely upon proof of mer membership or officership in the Communist Party witho proof of illegal advocacy by that organization and the ap plicant's awareness of such advocacy.

Applying each of these propositions to Petitioner's d naturalization proceeding, it is obvious that he has be deprived of his citizenship because of an erroneous inte pretation and application of the 1940 Act.

4. The opinion of the Trial Court, however, points one issue raised by the complaint in Petitioner's case h not before the Courts in either *Nowak* or *Maisenber* Thus, the opinion refers to the fact that in his 1940 Af Registration form (Govt. Exh. 3) Petitioner had stated follows:

> "10. I am, or have been within the past five years, or intend to be engaged in the following tivities:
>
> In addition to other information, list memb ships or activities in clubs, organizations, or so ties * * * (None)."
>
> * * * * *
>
> "15. Within the past five (5) years, *I have* been affiliated with or active in (a member of, cial of, a worker for), organizations, devoted

> whole or in part to influencing or furthering the political activities, public relations or public policy of a foreign government."

And the opinion asserts that Petitioner "failed to tell the truth in either instance."

Whether the Trial Court is suggesting this as an additional support for its finding of fraud, is not clear. But it is not without significance that in its opinion on Petitioner's denaturalization (App. 22a), the Court made no mention of this Alien Registration form and the sole evidence in the record on this issue is the form itself.

In any event, however, the questions and answers in Petitioner's Alien Registration Form, if relevant and material to the issues presented in his denaturalization case,[2] must be tested by the same standards of definiteness applied by this Court to the questionnaire in *Nowak*. And tested by these standards it is apparent that the questions and answers in this form do not warrant the Trial Court's conclusions of falsity.

The conclusion follows, therefore, that since Petitioner's case is indistinguishable in fact and in law from the Government's charges and the issues determined in *Nowak*, and since his case was not decided in accordance with the principles of law as clarified by this Court in those cases, the judgment of denaturalization against the Petitioner was erroneous.

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[2] Appellant's motion to strike from the Complaint in his denaturalization proceeding all references to his Alien Registration as irrelevant and immaterial was denied (App. 13a, par. 5). (See Trial Tr. pp. 19-20.)

II.

1. It appears, we think, from the concluding paragraph of the Trial Court's opinion denying Petitioner's motion, that the real basis for the Court's decision was not an adverse exercise of discretion under the Rule; nor a belief that the law was properly applied in Petitioner's denaturalization; but rather, that Rule 60(b) was inapplicable, as a matter of law, to the situation presented here. Particular reliance is placed by the Trial Court on this Court's decision in *Ackermann v. United States*, 340 U. S. 193 and the opinion of the Court of Appeals for the Sixth Circuit in *Berryhill v. United States*, 199 F. 2d 217 (1952).

Rule 60(b) in its pertinent part states:

> "*Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.*
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *"

Clause (6) of this Rule, "for all reasons except the five particularly specified [in the Rule] vests power in Courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601 at 615. In this case, both in

equity and injustice will flow from the retention and the prospective application of the denaturalization judgment.

In the first place consideration must be given to the nature of a judgment of denaturalization and the consequences it entails. If a denaturalization judgment is annulled, there is no disturbance of property rights, no adverse adjustment of the status quo, no chance of injuring third persons. The Government is not harmed by a reacquisition of citizenship by one who should not have been deprived of it. If anything, the Government, as the body politic, would benefit by the correction of the injustice done one of its citizens.

Denaturalization is "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development." *Trop v. Dulles*, 356 U.S. 86, 101. If an erroneous denaturalization judgment is allowed to stand, it may, and in this case will result in deportation to the added injury of the individual and his family. And this is so here because the alleged basis for denaturalization is also a ground for deportation. (See, *supra*, p. 9.) Petitioner's deportation will be unjust because predicated on an erroneous denaturalization judgment, but it will be unassailable on that account if the denaturalization judgment is not set aside in this proceeding. In the present case, Petitioner has lived in the United States for 43 years, since he was 16 years old. If the erroneous denaturalization judgment is allowed to stand, he will be exiled. It seems incredible that the Government, having inflicted on him the injury of an erroneous cancellation of his citizenship, should be able to utilize the judgment further so as to ruin his life completely.

2. The crux of the Trial Court's decision, affirmed below, is the following:

> "* * * Therefore, since Petitioner abandoned his appeal, as he states, 'because of the controlling decisions' [in *Chomiak, Sweet* and *Charnowola*] we have absolutely no alternative but to follow the Ackerman decision coupled with the Sixth Circuit Court of Appeals' statement in *Berryhill v. U. S.*, 199 F. 2d 217 (1952) which refutes petitioner's reasoning by saying:
>
> > 'It appears to be the settled rule that a change in the judicial view of the applicable law, after a final judgment, is not a basis for vacating a judgment entered before announcement of the change.' "

Ackermann v. United States, 340 U. S. 193, denied relief under clause (6) of Rule 60(b), not because the denaturalization judgment was not appealed, but because in the opinion of a majority of this Court the reasons advanced for failing to appeal—financial hardship and reliance upon poor advice from an Immigration Service employee—were deemed insufficient to overcome the view that a free and deliberate election had been made by Petitioner not to appeal. Even so Justices Black, Frankfurter and Douglas dissented, observing that the decision "neutralizes the humane spirit of the Rule and thereby frustrates its purpose" (at 202). Justice Clark did not participate.[3]

Ackermann, therefore, does not dictate a hard and fast principle to be applied indiscriminately whenever an appeal is not taken or is subsequently withdrawn. Instead, it requires an appraisal of the circumstances in each case;

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[3] Since the Supreme Court's 1958 decision in *United States v. Ohio Power Co.*, 353 U. S. 98, 77 S. Ct. 652 (discussed herein at p. 24) it is fair to suggest that *Ackermann* must be confined to its facts.

an exercise of discretion. In Petitioner's case the Trial Court declined to exercise any discretion because it believed that *Ackermann* precluded it from doing so. At most, *Ackermann* stands for the proposition that Rule 60(b)(6) may not be invoked to vacate an erroneous judgment, which might have been reversed by appeal but for the fact that the aggrieved party "slept on his rights" and deliberately elected not to appeal in a situation where he was not prevented from doing so and where it could not be said that an appeal would have been hopeless. It certainly does not mean that a failure to appeal, or the dismissal of an appeal by stipulation, prevents the Trial Court from exercising discretion under Rule 60(b). Cf. *McGrath v. Potash*, 199 F. 2d 166, discussed herein at p. 25.

3. *Berryhill v. United States*, 199 F. 2d 217 (1952), relied on by the District Court below, is in accord with our interpretation of *Ackermann*. After reviewing the facts the Court there found that no justifiable reason existed for petitioner's failure to pursue his remedy by appeal. The case involved simultaneous conflicting claims upon the Veterans Administration for the proceeds of a National Service insurance policy. Under the terms of the policy, the father of the veteran was named as beneficiary and a foster sister was named as contingent beneficiary. Monthly payments were made to the father until his death, after which claims were asserted by the foster sister as contingent beneficiary and by the heirs at law of the father. The Veterans Administration denied the foster sister's claim and she filed suit. The District Court ruled that a foster sister was not a proper person to be named as beneficiary under the National Service Life Insurance Act. No appeal was taken from this ruling.

At the time of the District Court ruling the Third Circuit had held for, and the Eighth Circuit had held against,

similar claims asserted by adopted brothers and sisters. The District Court neither relied on nor cited either of these two decisions. Subsequently, this Court reversed the Eighth Circuit and upheld the Third Circuit. Thereupon, the foster sister filed with the District Court a motion pursuant to Rule 60(b)(5) and (6) for relief from the previous judgment. The motion was denied and an appeal taken.

The Court of Appeals held subsection (5) of Rule 60(b) inapplicable because the judgment was not based upon any prior judgment subsequently reversed. It held subsection (6) inapplicable because petitioner's motion "states no reason for not taking an appeal" and the failure to appeal "was a free and deliberate choice."

In the instant case it cannot be said that Petitioner "made a considered choice not to appeal" (*Ackermann*, at p. 198). As pointed out above (p. 8-9) Petitioner here not only perfected his appeal in the face of the appellate Court's outstanding adverse decisions in *Chomiak*, *Sweet* and *Charnowola*, *supra*, but requested and was granted leave to delay filing his brief pending this Court's action in those three cases. And not until this Court had indicated an unreadiness in those three cases to consider the same legal arguments which Petitioner's appeal presented, did he finally stipulate for dismissal of his appeal.[4] Surely, under those circumstances, it cannot be said here, as in *Ackermann* and *Berryhill*, that no justifiable reason is shown for his failure to pursue his remedy by appeal or that his failure to appeal "was a free and deliberate choice."

We come, then, to the one statement in *Berryhill* which the District Court below held was controlling here; namely,

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[4] Compare the questions presented in the Petition for Certiorari in *Nowak*, *supra*, at pps. 33-42 and the questions presented in Petition for Certiorari in *Sweet*, *supra*, at pps. 17-19.

that "a change in the judicial view of the applicable law, after final judgment, is not a basis for vacating a judgment entered before announcement of the change."

Parenthetically, it is observed here that the minimum relief which Petitioner seeks is not necessarily a vacation of the denaturalization judgment; but rather relief from the prospective appplication and future operation of that judgment. In this respect Petitioner's case is peculiarly dissimilar from *Berryhill* and other cases in which relief from a money judgment is sought under Rule 60(b),[5] and is more in accord with the historical purpose that Rule was intended to achieve. See *Moore's Fed. Prac.*, 2 ed., Vol 7, pps. 283-303.

The short answer to the argument that what is involved here is "a change in the law", is, of course, that nowhere in *Nowak* and *Maisenberg* is there the slightest suggestion that this Court was making or intended to make a "change in the judicial view of the applicable law." Instead, the most that can be said in this connection is that either the precise issues had never been resolved by this Court, or the Court merely reiterated and applied its previous holding in *Schneidermann, supra*, with respect to the quality and the sufficiency of the proofs required to divest one of citizenship because of prior Communist Party membership. In either instance it would be incorrect to regard this as "a change in the judicial view of the applicable law."

But there is a more basic reason why the above quotation from *Berryhill* cannot be accepted as an unvarying rule to be applied to all final judgments regardless of its consequences in a particular case. And this reason finds expression, not only in what this Court recently said in

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[5] Cf. *Block v. Thousand Friend, et al.*, 170 F. 2d 428, where the Second Circuit held that relief from a money judgment should be granted under the Rule notwithstanding no appeal had been taken, where the District Court had approved the local O. P. A. order for repayment of rent and subsequently the Washington office of O. P. A. had overruled the local office.

United States v. Ohio Power Co., 353 U.S. 98, 77 S. Ct. 652 (1958), but in what the Court did. That case involved a suit by the power company to recover taxes paid under protest. The Court of Claims allowed recovery and the Government's petition for certiorari was denied. Thereafter, two (2) petitions for rehearing also were denied by this Court. Meanwhile, the Court of Claims reiterated its holding in a second similar case and more than one (1) year later, a different result was reached by the Court of Appeals for the Second Circuit in another similar case. This Court granted certiorari in both of these two latter cases and, at the same time, *sua sponte* set aside its six months old denial of rehearing in the *Ohio Power* case in order that the case "might be disposed of consistently with the companion cases" in which certiorari was granted.

In "the companion cases" the Government's position was sustained; and this Court thereupon reconsidered the Government's second petition for rehearing in the *Ohio Power* case, vacated the order denying certiorari, granted the petition for certiorari, and reversed the judgment below which had been adverse to the Government's contention. All of this was accomplished by the Court without benefit of a Rule 60(b), as Justice Harlan correctly pointed out in his dissent (*supra*, at p. 104, note 13). The justification given by the Court has peculiar application to this Petitioner:

> "We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the application of our rules. This policy finds expression in the manner in which we have exercised our power over our own judgments, both in civil and criminal cases."

Among the cases cited by the Court as reflecting this policy, was *Remmer v. United States*, 348 U.S. 904, where, follow-

ing denial of review by this Court, a different result was reached by the Court in later companion cases involving the same issues.' This Court then granted a delayed petition for rehearing in *Remmer*, restored the case to the docket and then remanded it to the Court of Appeals "in order that the Court on the whole record may reconsider the case in the light of our recent decisions . . . ."

At a minimum, the same disposition made by this Court in *Ohio Power* should be made by this Court on behalf of this Petitioner.

In *McGrath v. Potash*, 199 F.2d 166, the Government was confronted with precisely the same legal question now raised by this Petitioner and successfully pursued the same course of action as Petitioner here.

Deportation proceedings had been instituted against *Potash*. He sought an injunction, contending that his deportation hearing was not being conducted in conformity with the Administrative Procedures Act. The District Court granted a permanent injunction and the Government appealed. While the appeal was pending, the same issue was decided by this Court in another case and its decision was in accord with the District Court's decision in the *Potash* case. Accordingly, the Government's appeal in the *Potash* case *was dismissed by stipulation*. Later, Congress amended the law so as to make the Administrative Procedures Act inapplicable to deportation hearings. The Government then moved under Rule 60(b)(6) to vacate the above-mentioned final judgment. The District Court denied the motion and the Court of Appeals reversed, holding that the subsequent change in the applicable law removed the basis for giving any *prospective effect* to the prior judgment.

Finally, mention should be made of *Title v. United States* (C.A. 9th, decided January 6, 1959, cert. den. June 15,

1959). The Petitioner there sought relief by motion under Rule 60(b) from a judgment of denaturalization. The Complaint filed by the Government in the denaturalization proceeding on October 21, 1954 did not include the affidavit of good cause, but *Title's* motion to dismiss the complaint for this reason, was denied by the District Court and on July 14, 1955 judgment of denaturalization was entered. *Title* filed an appeal, on September 8, 1955, which was later dismissed by the Court of Appeals on February 27, 1956 "for failure of appellant to prosecute the appeal."

Meanwhile, on October 10, 1955, this Court granted certiorari in *United States v. Zucca*, 350 U.S. 817, and on April 30, 1956, about two months after dismissal of *Title's* appeal, this Court decided in *United States v. Zucca*, 351 U.S. 91, that the affidavit of good cause "must be filed with the complaint when the [denaturalization] proceedings are instituted. Two years later, in the *Matles, Lucchese* and *Costello* cases (356 U.S. 256), this holding was reiterated.

It was not until two years after the issue had been determined in *Zucca* and on May 22, 1958, that *Title* moved to set aside and vacate his denaturalization judgment "on the ground that the judgment was void in that the required affidavit showing good cause was never filed and that it was no longer equitable that the judgment should have prospective application." The order denying his motion was affirmed, the Court of Appeals saying:

> "* * * Were Title's appeal presently before us, we would reverse the judgment of denaturalization rendered against him by the district court. But that appeal he has voluntarily failed to prosecute. He is in the same status as any other individual who fails to protect fully his valid legal rights, by neglecting to perfect his appeal.
>
> * * * * *

"* * * Rule 60(b) was not intended to provide relief for error on the part of the court or to afford a substitute for appeal." (Citing *Ackermann* and *Berryhill, supra.*)

The decision in *Title* is not in conflict with Petitioner's position here. The pertinent difference between the two, for purposes of Rule 60(b) relief, is that in *Title* (as in *Ackermann* and *Berryhill, supra*) the Petitioner, in a situation where he was not prevented from doing so and where it could not be said that an appeal would have been hopeless, nevertheless, made a free and deliberate choice not to perfect his appeal. *Zucca* was pending in this Court at the very time *Title's* appeal was pending in the Court of Appeals. But unlike the Petitioner here, *Title* neglected to preserve his appeal pending the outcome in Zucca; neglected to move within a reasonable time; and the record disclosed no reason for his neglect.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

GOODMAN, CROCKETT, EDEN & ROBB,
By GEO. W. CROCKETT, JR.,
Attorneys for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

Dated: Detroit, Michigan,
December 16, 1959.

APPENDICES

APPENDIX A

No. 13,788

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Gus Polites,
Appellant,
vs.
United States of America,
Appellee.

ORDER

(Filed October 16, 1959)

Before: McAllister, Chief Judge, Martin, Circuit Judge and Weick, District Judge.

The above cause coming on to be heard upon the transcript, the briefs of the parties, and the arguments of counsel in open court, and the Court being duly advised,

Now therefore it is ordered, adjudged and decreed that the judgment of the District Court be and is hereby affirmed for the reasons set forth in the Opinion of Judge Picard.

Approved for entry:

Thomas V. McAllister,
United States Circuit Judge.

APPENDIX B

OPINION DENYING MOTION

(Entered November 19, 1958)

STATEMENT OF FACTS

Gus Polites entered the United States from Greece in 1916, filed petition for naturalization October 6, 1941, and received Certificate of Naturalization April 6, 1942. Complaint to cancel his citizenship was filed June 16, 1952, and after full hearing we ordered cancellation August 20, 1953, in accordance with opinion filed August 13, 1953 (amended February 23, 1955). Appeal therefrom was commenced, but dismissed by stipulation of counsel. The motion now under consideration informs us that petitioner in another suit in this District is contesting deportation proceedings.

More than six years after order of cancellation, August 6, 1958, Polites filed a motion for relief from judgment pursuant to Rule 60 (b) (5) and (6):

> "On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment, * * * for the following reasons: * * * (5) * * * it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

claiming that the recent decisions of Nowak v. U. S. and Maisenberg v. U. S., 356 US p. 660 and p. 670 (decided May 6, 1958) should equitably and legally control the issues in this case.

While recent decisions would not usually control unless the facts therein and applicable law were the same as confronted the court in the Polites matter, we present these pertinent facts:

Both Nowak and Maisenberg were naturalized under the Act of 1906; but Polites was naturalized under the Act of 1940. Of course this difference in fact does not control the question of law, but it is well to observe in connection therewith that these questions were asked of Nowak and Maisenberg:

> "28. Are you a believer in anarchy? • • • Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? • • • "

While on the other hand Polites was put under a stricter obligation. He was asked to

> "• • • list memberships or activities in clubs, organizations, or societies."

to which he then or had belonged and he also answered that

> "15. Within the past 5 years *I have not* been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government."

Again this is not controlling of the law but is part of the background of this case since he failed to tell the truth in either instance.

CONCLUSIONS OF LAW

The Nowak and Maisenberg cases, supra, which petitioner relies on, hinge upon three considerations, the first being the construction of above question 28. On page 663 the Supreme Court says:

> "* * * Question 28 on its face was not sufficiently clear to warrant the firm conclusion that when Nowak answered it in 1937 he should have known that it called for disclosure of membership in non-anarchistic organizations advocating violent overthrow of government. * * *"

Second, on page 665:

> "* * * the Nationality *Act of 1906* (emphasis ours) under which this preliminary naturalization form was issued, prohibited anarchists, but *not* communists, from becoming American citizens, * * *"

and, finally, on page 666 the same court said:

> "* * * it has not been established that Nowak knew of the Party's illegal advocacy."

These decisions do not as contended by Polites clearly control the instant case warranting relief from judgment, if for no other reason than that the question construed is entirely different in form and content (actual knowledge of intent of communist sympathy is not required here), the applicable acts differ, and because the Act of 1940, under which Polites was naturalized *did* provide the following prohibition which did not appear in the 1906 Act:

"U. S. C. 705, 54 Stat. 1141:

> No person shall hereafter be naturalized as a citizen of the United States—* * *
>
> (b) Who believes in, advises, advocates, or teaches, *or who is a member of or affiliated with any*

organization, association, society, or group that believes in, advises, advocates, or teaches—(1) the overthrow by force or violence of the Government of the United States or of all forms of law;" (no actual knowledge is necessary) "or (2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or any other organized government, because of his or their official character; or (3) the unlawful damage, injury, or destruction of property; or (4) sabotage." (Emphasis ours.)

Petitioner emphasizes that deportation embodies harsh punitive measures. But his deportation is being considered elsewhere while we are concerned solely with his citizenship naturalization, a privilege and obligations sought by him and bestowed by the sovereign only upon the conditions it selects.

In support of Rule 60's applicability, petitioner cites Leaks v. Myers, 27 LW 2130 and Klapprott v. U. S., 335 US 601. Neither applies. But Ackermann v. U. S., 340 US 193 (1950) states:

> "Neither the circumstances of petitioner nor his excuse for not appealing is so extraordinary as to bring him within Klapprott or Rule 60 (b) (5)."

In this case therefore the court had the benefit of Rule 60 (b)'s provisions but would not follow the Klapprott case supra, because there was no "excusable neglect" in Ackermann, but there was in Klapprott. Therefore, since petitioner abandoned his appeal, as he states, "because of the controlling decisions", we have absolutely no alternative but to follow the Ackermann decision coupled with the Sixth Circuit Court of Appeals' statement in Berryhill v.

U. S., 199 F. 2d 217 (1952) which refutes petitioner's reasoning by saying:

> "It appears to be the settled rule that a change in the judicial view of the applicable law, after a final judgment, is not a basis for vacating a judgment entered before announcement of the change."

Ordinarily we would have granted petitioner's prayer, particularly under subsection (b) (5) of Rule 60, authorizing us to do so, if

> "it is no longer equitable that the judgment should have prospective application;"

But in our opinion, our Court of Appeals specifically eliminates such holding where the only reason for abandoning the appeal was because of the then status of the law under the "controlling decisions".

For the reasons given petition is denied.

/s/ Frank A. Picard,
United States District Judge.

Dated: November 19, 1958.